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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6909

RICHARD BILELLO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF PEOPLE-RESPONDENT OF THE STATE OF NEW YORK

Statement of Facts

On October 4, 1966, Edward Hickey was murdered under circumstances which made the Kitty Genovese Case pale in comparison.

Edward Hickey, a young man, drove a Honda motorcycle to the vicinity of the Arrochar Inn, in South Beach, Staten Island. He parked it and entered the Inn at about 8:30 p.m. on October 3, 1966. Hickey was a resident of Brooklyn and a stranger. He played pool and drank without incident until Richard Bilello, the appellant, entered the premises with two companions, Fred "Squeaky" Clifford and Anthony De Vito at about 2:00 a.m. on October 4, 1966. The bartender, Leo Sciarabba, had asked Hickey to move his motorcycle from the front of the premises where it was in a bus stop. He moved it across the street and left it in front of the Bridge Luncheonette, a twenty-four hour lunchroom operated for the previous several months by the appellant.

Bilello entered the Arrochar Inn (he had been in the place earlier with his wife, without incident) and interrupting a pool game already in progress, took a few shots, before he directed his attentions to Hickey. Bilello then demanded of Hickey that he move the motorcycle and when he declined, Bilello stated that it was stolen. He took the registration from Hickey and sent Squeaky outside to check the registration. When Squeaky reported that the registration checked out, Bilello continued to abuse Hickey. He called him a junkie and demanded that he roll his sleeves up to inspect his arms. Bilello also pushed Hickey into the men's room where they remained for several minutes. Sciarabba intervened in behalf of Hickey. Bilello had what appeared to be a gun which was displayed from time to time. Bilello grabbed Hickey by the cheek and said "Don't worry, Eddie, I will kiss you before I kill you". He also told him that Sciarabba had saved his life. He proposed that they go to the Jack of Clubs, a nearby tavern. He offered Hickey money and told him to go back to Brooklyn. He threw punches at

Hickey shadow boxing style. He told Hickey that he wanted to fight him, that blood would be spilled and that "he would bet ten dollars that he could make Hickey's hair stand up straight with one shot".

Bilello sent De Vito across the street for a bottle of brandy and a .38 caliber gun. De Vito gave this second gun to Bilello and the brandy to the bartender.

Bilello, together with Squeaky and De Vito, started to leave the Arrochar Inn with Hickey at about 3:00 a.m. At the door, Hickey put his hands out and braced himself at the door. They then sat for a time at a table near the door. Shortly afterward Hickey, Bilello, Squeaky and De Vito left.

The four then proceeded to the Jack of Clubs, which was several blocks away, in Bilello's car. The Jack of Clubs was closed and empty. De Vito went to the rear, broke a small window, then returned to the front of the premises and forced open the front door. The four entered, Bilello gun in hand. The door was closed, the lights turned on, the juke box connected and songs played. Finally drinks were poured and Bilello again pressed Hickey to admit that the motorcycle was stolen. They argued and Bilello struck Hickey over the head with a pistol. He hit him in the mouth and when Hickey ran for the door he slipped and fell. Bilello kicked him in the head. De Vito and Squeaky put Hickey up on a stool and Bilello ordered Hickey to drink. As Hickey went to take a drink, Bilello shot him in the head twice with the .38 caliber gun. He fell to the floor and Bilello put the third shot in his temple with the admonition, "Always put one in the temple so they can't talk."

The three left Hickey on the floor of the Jack of Clubs and left. They drove over the Verrazano Bridge, stopping

at the center where after wiping the weapon it was thrown into the Narrows by Squeaky Clifford.

They returned to the Arrochar Inn just before closing time, had a drink, and Bilello told the bartender, Sciarabba, that they had chased Hickey over the bridge to Brooklyn where they lost him. Bilello claimed to have eaten at Nathan's and that a hamburger had made him ill. They left and Sciarabba closed up.

The police responded to the Jack of Clubs when a tenant in the apartment above, Mr. Bonamo, hearing a window break and the juke box play, called the police. The patrol car responded and the patrolman entered and discovered a body. The police arrived at 3:40 a.m. and they commenced their investigation. Blood stains were found on the floor and in these stains a heel print appeared with the inverted word "Pilgrim" in it.

The appellant, Bilello, appeared at the scene after the police arrived, carrying coffee. He told Detective Collins that he was going to see Lenore who also lived above the Jack of Clubs. The officer went with him to her apartment where she readily admitted him. While he was in the apartment, he asked her to hold his .25 caliber Berretta which she did.

At about 5:20 a.m. Bilello, who according to Lenore Carletti had had much to drink, left her apartment when a cab came for him. On the way out he passed Detective Collins who asked him if he could see his shoes. Bilello readily agreed and took them off handing them to Collins. Collins then for the first time saw what appeared to be blood in the welt of the shoe. The shoes also had "Pilgrim" written on the heels. Bilello was amiable and cooperative and sat in a car and later slept in the rear of the Jack of Clubs. He was not arrested at this time.

Bilello was asked if he knew the victim and he responded that he did not.

Five days after the killing Lenore Carletti was taken by Squeaky to a motel in New Jersey where Bilello was staying. She asked him about the murder and why he ran and was hiding out. Bilello stated that he did not kill Hickey but that he had to take the blame for it. He said Paulie Red killed Hickey and that in return for taking the blame, he was given the ownership of a restaurant on Staten Island.

Bilello returned to Staten Island from the New Jersey motel on October 9, 1966 with Squeaky. He had marked Bilello's back with sandpaper to put crosses on it and then handcuffed him. Bilello told Squeaky that the story was to be that some police had been holding him. They let Bilello out near Staten Island Hospital. Detective Collins took Bilello into custody at this hospital.

An autopsy was performed on Hickey by Dr. Wilbur who later retired as Assistant Medical Examiner. It was done in Dr. Milton Helpern's presence. The cause of death was three bullet wounds of the skull. The slugs were recovered and established by expert testimony to be .38 caliber. The .38 caliber gun thrown from the Verrazano Bridge was obviously not recovered for comparison.

The autopsy report was silent as to facial and head injuries which would be consistent with the beating and kicking described by Squeaky Clifford and Anthony De Vito. A prior trial had ended with a hung jury. After that trial and before the trial leading to the conviction, the People secured an ex parte order to exhume the body of Hickey. This was done and Dr. Helpern determined that facial wounds inflicted prior to death were present.

These injuries were confirmed by the undertaker who had prepared Hickey's body for burial after the first autopsy.

The stains on Bilello's shoes were tested and proved to be blood but the amount was too small to determine whether it was human blood. Bilello stated to the police that he had cut himself while slicing roast beef in his luncheonette and that this could be the source of the bloodstain.

The witnesses at the Arrochar Inn were Leo Sciarabba, the bartender, Robert Turrisi, Charlie Brown, Alex Warren, Dennis Tucker, Terrence Campbell and Lawrence Smolka as well as Squeaky and De Vito. Not all of these persons saw and heard the same things but generally the story of Bilello's aggressiveness and Hickey's passiveness came out. None of them called the police. None prevented Bilello from forcing Hickey to leave.

Sciarabba, the bartender was present while Bilello abused Hickey in the Arrochar Inn and on his return just before closing at 4:00 a.m. Similarly, Robert Turrisi, Charlie Brown, Alexander Warren and Dennis Tucker who were customers were present at both times. Terrence Campbell and Lawrence Smolka were present while Bilello was in the premises with Hickey but had left before he returned at closing time.

The appellant offered no defense although in the opening, Counsel said he would testify, would tell of his criminal record and would prove he was framed. (pages 38-40).

Motions

Prior to trial the appellant moved to suppress the shoes which were placed in evidence. A hearing was held at which the appellant testified. The motion was denied.

A motion was made for an order suppressing the second autopsy report dated June 13, 1967 by Dr. Helpern, the Chief Medical Examiner. This motion was denied.

A motion was made for an order directing that the complete record of the previous trial and the transcript of all preliminary hearings be furnished the appellant without payment. The Court had, prior to the motion, directed that the testimony previously given by the witnesses be delivered to his attorneys. On this basis the motion was denied.

Disposition

After trial the appellant was convicted by the jury of murder in the second degree and on January 25, 1971 was sentenced to forty years to life, nunc pro tunc as of September 18, 1968. The conviction was affirmed in the Appellate Division and the Court of Appeals of the State of New York.

POINT I

The defendant received a transcript of the testimony of each witness who testified against him previously in compliance with the constitutional requirement.

The trial court in reliance on *People* v. *Ballott,* 20 N. Y. 2d 600 provided the appellant prior to his second trial with a transcript "of the testimony previously given by the witnesses who were again to testify against the defendant." The court in doing so relied on the express language of *People* v. *Ballott, supra,* at page 604 which read:

> "In a case such as the present—where the first indictment had been dismissed because of insufficient evidence of identity and the first trial had resulted in a mistrial because the jury had been unable to agree on a verdict—the defendant's need for the minutes of the earlier trial is particularly obvious. Under the circumstances, the defense was 'entitled' to procure the testimony previously given by the witnesses who were again to testify against him in order to enable him to conduct an effective cross-examination. (See, e.g., People v. Rosario, 9 N Y 2d 286, 289; People v. Malinsky, 15 N Y 2d 86, 90.) Without such testimony, a defendant is deprived of a substantial right. And, where he is an indigent, the State must make that testimony available to him. (See People v. Montgomery, 18 N Y 2d 993; People v. Jaglom, 17 N Y 2d 162, 165; Williams v. United States, 358 F. 2d 325 (9th Cir.); Peterson v. United States, 351 F. 2d 606 (9th Cir.); People v. Miller, 35 Ill. 2d 615.)"

The holding in *United States ex rel. Wilson* v. *McMann*, 408 F. 2d 896 (2d Cir. 1969) is consistent with *People* v. *Ballott, supra.* Like *Ballott* it holds that the denial of that part of the transcript of the prior trial that contained the testimony of prosecution witnesses constituted a violation of his constitutional rights.

People ex rel. Cadogan v. *McCann*, 24 N. Y. 2d 233, 236 discusses the basis for the development of the principle of disclosure.

> "The Rosario case, however, held merely that the defense was entitled, at the trial, to the prior statements of prosecution witnesses made 'to police, district attorney or grand jury' (id., p. 289). The de-

fense was thereby given access to ex parte statements that would otherwise remain undisclosed to him throughout the trial. The Rosario case required only that an ex parte statements made by prosecution witnesses should be made available to the defense at the trial. It did not require that the defense be afforded transcripts of testimony given in the presence of both the defendant and his counsel, or that they be made available before the trial or before the prosecution witnesses had testified.

True, the rationale for the rule was that such statements might be of significant assistance to the defense, even if not inconsistent with the trial testimony, and, of course, transcripts of testimony given in the presence of a defendant represented by counsel are also helpful in trial preparation and tactics. The Rosario doctrine was, however, not extended to cover pre-trial requests for transcripts of earlier proceedings at which the defendant was present until 1967, in People v. Ballott (20 N Y 2d 600, 603-605, supra)."

The opinion of the trial court concerning the motion for the minutes of the previous trial and preliminary hearings states:

"This court, prior to this motion, had directed that a copy of the testimony previously given by the witnesses who were again to testify against the defendant be delivered to the attorneys for the defendant. They have received a copy of the stenographic minutes.

Motion denied. Submit order." (Appellant's Appendix A9 in Court of Appeals).

It would appear from this opinion that at the time it was issued the defense already had in its possession the transcript of the testimony of the prosecution witnesses from the previous trial and preliminary hearings. The record reveals no objections by the defense that it had not actually received these transcripts.

Although it is not a part of the record, the Court Stenographer's records show that he delivered at least 2085 pages of testimony to the defense. An examination of the first trial record reveals that testimony of the first witness began on page 48 and the last defense witness ended on page 2131 for a total of 2083 pages. The defendant's own testimony was within these 2083 pages. It would appear from the opinion that the trial court believed that the defense had all the prosecution witnesses' testimony from the trial and preliminary hearings. The defense did not make any record to show that it had not actually received all of the testimony the court said it had. Had the defense not received any part of the prosecution witnesses' testimony by reason of some delay or oversight by a stenographer with this record the court certainly would have seen that its wishes would be carried out. The defense's conduct certainly constituted a waiver.

If the defense already had the minutes of the entire first trial as the court stenographer's records suggest, then all it had to do was ask for the testimony of the prosecution witnesses from the preliminary hearings and it would have had all the testimony save only defense testimony in the preliminary hearings.

It would appear that no great effort was made by the defense to sort out or distinguish for the court just what minutes it actually received and even though it actually

had all the trial minutes of the first trial it would appear that it could have had all the prosecution testimony at the preliminary hearings simply by asking for it. Under the view most unfavorable to the People the only testimony not available to the defense was that of actual defense witnesses in the preliminary hearings.

People v. *Zabrocky*, 26 N.Y. 2d 530 and *People* v. *West*, 29 N.Y. 2d 728 held generally that an indigent defendant had a constitutional right to free transcripts of preliminary hearings. But in *People* v. *West, supra the* sole witness was *against* the defendant and in *People* v. *Zabrocky supra* the sole witness again was *against* the defendant and the request was made for the purpose of cross-examination.

In *People* v. *Zanotti*, 30 N.Y. 2d 926 the court made a comment in a case rather similar to this saying at page 927:

> "This defendant was present at the prior trial, knew what the testimony was, and as far as the record shows could have purchased the minutes.
>
> Even if defendant had been entitled to the minutes and the court's refusal to direct they be furnished be deemed error, proof of the defendant's guilt is so overwhelming that such an error, as the Appellate Division observed, would have been harmless."

As was stated by Judge Jasen in the dissent in *People* v. *Zabrocky, supra,* at page 537:

> "Automatic reversal of a judgment of conviction should not apply to all constitutional errors because 'there may be some constitutional errors which in

the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless'. (Chapman v. California, 386 U.S. 18, 21, 22; see also Harrington v. California, 395 U.S. 250.)"

POINT II

Defendant asked for and received at the second suppression hearing the minutes of the first hearing which he specifically requested.

The appellant stated at the beginning of the hearing, "Your Honor, before we start, I would like to ask if the District Attorney is going to use the minutes of the last suppression hearing. I would like a copy of them, if I am entitled to them under the law." The prosecutor answered, "With respect to the defendant's request, or with respect to his reference to the minutes of the previous hearing, I might inform the Court that I have a full and complete transcript of that hearing, and if he desires during the course of this hearing to use these minutes, I will make them available to him at any time." The appellant then said he wished to proceed (S. 3-5).* Since the appellant received the particular record he asked for it is hard to see a basis for his complaint that he didn't get the grand jury testimony of Detective Collins and Molten which he did not ask for. In any event the appellant clearly was satisfied then for he asked to proceed without objection.

The prosecutor suggested at the conclusion of the direct examination of the first witness that the appellant

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* S. 3-5 designates page number of suppression hearing minutes.

be given an opportunity to peruse the minutes of the previous hearing and that a recess be called. The Court declined to do so (S. 17) and directed the appellant to commence his cross examination. He did so from 11:10 A.M. to 12:03 P.M. when the court recessed. The court did not reconvene until 2:54 P.M., approximately two hours and fifty one minutes later. This certainly gave the appellant sufficient time to prepare since he was given the minutes to take with him to the pen (S. 65). In any event he made no objection. The appellant did thereupon use the minutes to cross examine the first witness. The direction of the Court in these circumstances seems to be an exercise of its sound discretion.

POINT III

The motion to suppress the shoes was properly denied.

There is no question here but that the evidence in the hearing on the motion to suppress the shoes produced absolutely conflicting testimony. According to the testimony of Detective Collins, the appellant approached the building housing the Jack of Clubs at about 4:10 a.m. on October 4, 1966. He spoke to Bilello as he was about to ascend the stairs and asked him what he was doing. Bilello explained that he was out with his wife between 10 and 12 at the Paramount Bar and then went to the Arrochar Inn. He said he had a fight with his wife, called Lenore, obtained a container of coffee from his luncheonette and was about to visit Lenore. Bilello said he didn't know Lenore's last name. The officer went with Bilello upstairs and a young woman, Lenore Carletti, admitted Bilello to her apartment. Detective Collins then left to resume his investigation of the murder.

At 5:20 a.m. Detective Collins heard a horn blow and left the Jack of Clubs. As he did, he saw Bilello on the steps and spoke to him at the sidewalk. He asked Bilello if he could see his shoes and Bilello readily consented, jumping up on the fender of a parked car and removing his shoes. He handed them to Collins. Collins then commented that there appeared to be blood on the shoes and Bilello told him he had cut his finger on a slicing machine at about 1:00 a.m. that morning. He volunteered to Collins that "You can have my shoes or anything else I got! You guys know I'll do anything to help you." Collins stated that Bilello was not under arrest and was not arrested until October 9, 1966. On cross examination, it was determined that Collins had seen shoe prints in the blood inside. Collins never gave any *Miranda* warnings nor did he obtain or ask for any written waiver or consent from Bilello to keep the shoes.

Collins first saw the blood on the shoes when they were handed to him (S. 34). He took no precautionary measures against any weapon Bilello might have had when he first saw him (S. 37). After the shoes were given to Collins, Bilello was not searched (S. 34). Collins left him sitting on a car and returned inside. Collins later saw Bilello walk across the street, enter a squad car and go to sleep. He only had socks on his feet (S. 45).

Detective Molten confirmed the conversation Collins had with Bilello (S. 81) and the delivery of the shoes. Molten asked Bilello if he would wait awhile (S. 84) and Bilello indicated that he would help in any way. Molten said Bilello was not under arrest (S. 85). Around 6:30 a.m. Molten went with Bilello to get a pair of shoes from Bilello's luncheonette and then returned to the Jack of Clubs. On cross examination Bilello established that Molten knew of him. He also brought out that Bilello looked

at the dead man and said he didn't know him (S. 103). Bilello went to sleep in the back room of the Jack of Clubs after they returned and when Molten looked back there he asked where Bilello was. He learned that Bilello asked to go and left the club (S. 127).

Balanced against the consent and cooperation described by Detectives Collins and Molten was the testimony of Anthony DeRosa an employee and friend of Bilello. He stated that Bilello and Molten arrived at the luncheonette after 8:00 a.m. and that Bilello asked for coffee. He was served and then went in the back with Molten (S. 132) where a dispute ensued. He overheard the dispute and related that Bilello told Molten that "you took" or "you robbed my clothes" (S. 133). DeRosa said that after this exchange Bilello remained at the luncheonette. He said Bilello walked into the luncheonette with no shoes, no shirt, no jacket, dressed only in a T. shirt, pants and stocking feet (S. 134). On cross examination DeRosa said he regarded Bilello as a brother (S. 138).

Bilello testified in his own behalf. He stated that he was questioned by Collins as he was going up the steps to Lenore Carletti's apartment. He told Collins "If you want to ask me any questions, or if I'm under arrest, I would like to call my lawyer." Collins replied "Look, there's nothing to hide. I would just like to know where you were between the hours of midnight and now". He explained where he was and that he was responding to a call from Lenore and after ringing the bell and having had Lenore Carletti verify that she sent for him, he entered her apartment. Afterward, at about 5:10 or 5:20 she called a cab. He heard a horn blow and went outside. As he came down the stairs he was grabbed by Collins. His shoes were forcibly taken from him. He asserted his constitutional rights and demanded counsel.

He was placed in custody in a police car and told that if he didn't wait he would be locked up for disorderly conduct by Collins. Collins told him to urinate in the street and told him he could be arrested for indecent exposure when he did so. He was told to be quiet and he would be released. He said he was held as the shoes were taken off by a detective (S. 155-157). Bilello stated he had eight or ten drinks that night. He said that the blood on his shoes could have come from cutting himself on a slicing machine around, eight, nine or ten o'clock that evening (S. 159). He stated that his suit was taken from him at the rear of the luncheonette (S. 164).

The defendant related that he had loudly objected to his treatment in front of the Jack of Clubs. He claimed he was threatened with arrest for disorderly conduct unless he quieted down. The police on the other hand stated that he was entirely cooperative and no such disorder occurred. With all the witnesses available, both civilian and police, only Bilello told of his angry objections to the proceedings. He conceded his extensive criminal record (S. 175-180).

One would normally assume that the perpetrator of a crime would stay away from the scene. Yet the proof is clear that Bilello deliberately returned to the very building in which he murdered Hickey within an hour of the commission of the deed. We can speculate as to why the perpetrator would do this. He was aware that numerous witnesses observed him abusing and threatening the life of Hickey up until 3:00 a.m. He knew of two eyewtinesses to the very killing. Is it unreasonable to conclude that Bilello was chucking a bluff which he hoped would refute and negate his guilt? This bluff would be borne out by his return to the scene, his visit to Lenore Carletti and his complete and total cooperation with the police.

Would a guilty man do the foregoing, he reasoned? Not likely. It therefore becomes plausible that Bilello, operating with his warped and erratic reasoning, drink sodden, made a conscious, deliberate effort to divert suspicion from himself by his cooperative conduct.

There is no rule of law which precludes a voluntary admission. Clearly, Bilello was never under arrest that morning. He came and left at his own bidding. He was allowed to be present at the scene when he may very well have learned the development and progress of the investigation. Simply because his cooperation backfired ought not to render the results of that cooperation nugatory. It is clear that he thought his conduct was throwing the police off his trail. Had he realized that his Pilgrim heel mark was in the bloodstains or that his shoes were blood spattered, you can rest assured that he never would have approached the scene. But it was typical of the bravado with which he operated that night that he would take the tack that he did. His whole conduct that evening was one giving an impression of stern devotion to the right while recklessly incriminating himself. Is it improbable to accept the fact that a man who could publicly threaten the life of a stranger with "First I'll kiss you and then I'll kill you," could also recklessly, freely cooperate with the police thinking he was outwitting them? Clearly, the master criminal who instructed his cronies with the fine technique of the shot in the temple, enjoyed his encounter with the police, who had to be groping for the answers when he was in possession of all of the facts.

In short a defendant who chooses to expose himself to scrutiny, intentionally assuming that he is deceiving the authorities should not now be heard to complain. The cases cited by the appellant generally deal with the possession of contraband of some sort. The person possess-

ing such contraband immediately recognizes that he is in serious trouble if he complies and yet complies because he feels he must submit to authority. How different it is in the case where Bilello returned to the scene, cocksure of his ability to deceive the police and perfectly willing to engage in his act of innocence. The clever Killer, who gave instructions in how to positively dispatch a victim with a shot in the temple, certainly never entertained the idea that, clod like, he marched through the victim's blood.

He had been back to his luncheonette before visiting Lenore, where, had he been concerned about his shoes incriminating him, he could have exchanged them. Clearly, it was his belief that he had nothing to fear from volunteering the shoes, coupled with his desire to throw off suspicion by an appearance of cooperation which motivated Bilello rather than any notion that he was intimidated by Detective Collin's request.

In *People* v. *Yukl,* 25 N. Y. 2d 585 the question of custodial and non-custodial interrogation was discussed. The test was set forth on page 589. "In deciding whether a defendant was in custody prior to receiving his warnings, the subjective beliefs of the defendant are not to be the determinative factor. The test is not what the defendant thought, but rather what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position. (*Hicks* v. *United States,* 382 F. 2d 158; see, also, *People* v. *Rodney P.* (*Anonymous*), 21 N. Y. 2d 1; *Williams* v. *United States,* 381 F. 2d 20; *Fuller* v. *United States,* 407 F. 2d 1199; *State* v. *Seefeldt,* 51 N. J. 472; *Conyers* v. *United States,* 237 A. 2d 838 (D. C. Ct. of App.); *State* v. *Bower,* 77 Wn. 2d 634.) Moreover, the fact that a defendant is being interviewed in the police station does not necessarily mean that he is to be considered "in custody". (*United States* v. *Bird,*

293 F. Supp. 1265; *Freije* v. *United States,* 408 F. 2d 100; *Hicks* v. *United States, supra.*) This is merely one of the factors to be considered in reaching the ultimate conclusion."

Interestingly, in the *Yukl* case the officer there made a request to examine a garment which was voluntarily offered and examined at a time when no arrest had been made. The parallel to the shoes in this case is apparent.

The rule of law concerning the review of findings is also contained in the *Yukl* case. At page 588 the court stated, "We note at the outset that in reviewing the hearing court's finding that there was no custodial interrogation prior to the warnings being administered, and that admissions given were voluntary, great deference must be allowed the trier of fact. As we said in *People* v. *Leonti* (18 N. Y. 2d 384, 390), "Where there are conflicting inferences to be drawn from the proof, the choice of inferences is for the trier of the facts. And that choice is to be honored unless unsupported as a matter of law". Our review is limited to the question of whether there was sufficient evidence to support the hearing court's finding. (*People* v. *Boone,* 22 N. Y. 2d 476.) We conclude that the evidence was sufficient and therefore, the judgment should be affirmed."

POINT IV

The second autopsy report and the evidence which flowed from it was properly received in evidence.

After the conclusion of the first trial, an *ex parte* order was obtained by the People directing the exhumation of the body of Hickey and for the performance of a second

autopsy. The original autopsy was silent concerning marks, cuts or bruises of the face and scalp although the testimony of Clifford and DeVito showed that Dilello had beaten Hickey's face with his fists, had struck him over the head with a pistol and had stomped his head before shooting him in the head three times. Dr. Helpern performed the second autopsy and testified as to facial and head injuries consistent with the beating described by the eyewitnesses. He described the body as being in an excellent state of preservation.

The order obtained for the second autopsy in some way makes an ordinary act appear out of focus. What makes the scene blurred however, is the order itself. The law and customs of our society hold that a man, once interred, has a right to remain so. Only when a court is satisfied that some useful or necessary purpose will be served by exhumation will it be allowed. But the law concerns itself with the rights of the departed and of his survivors. Once that question has been resolved, the remains are, for the purpose of a criminal trial as they were at the initial autopsy, a mere source of evidence.

Had the appellant believed that an exhumation of the victim could have aided his defense, such an order could have been obtained. Simply because the prosecution decided to take a second look at a source of evidence, can it be said that the appellant had an absolute right to be present? If a forged instrument was sent back for a re-evaluation by a handwriting expert or a weapon by a ballistic expert, would there be a need to do this on notice to the defendant? The answer seems clear that no notice is called for. Why then should this be true because the evidence is human remains? Cross-examination could test the validity of such a second autopsy just as well as it probed the first. To accept appellant's theory, once an

indictment has been returned no photograph of a scene could be taken, no measurement could be had, no additional test could be made save on notice to the defense.

The People contend that there was no error in the *ex parte* exhumation and autopsy. However if there was error clearly it was harmless error. Dr. Helpern was certainly a disinterested witness who would report only what he saw. The second examination did not prevent the appellant from seeking his own examination if he chose. It was recently stated in *People* v. *Harris,* 31 A. D. 2d 829 at 830, "However, it is now well settled that "harmless-constitutional-error rule" does not mandate reversal where the appellate court concludes that the error was harmless beyond a reasonable doubt (*Chapman* v. *California,* 386 U. S. 18, 22). This means that the error is harmless if it could not in any event affect the outcome and did not play a "meaningful role" in the case (*People* v. *Savino,* 22 N. Y. 2d 732, 733; *People* v. *Ross,* 67 Cal. 2d 64). In an analogous factual context our Court of Appeals has recently said, "It is difficult to conclude that the errors were of sufficient consequence to merit a new trial" (*People* v. *Miles,* 23 N. Y. 2d 527, 544).

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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